

OFFICE OF INDEPENDENT COUNSEL
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October 19, 1989

BY HAND

The Honorable George H. W. Bush
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. President:

Unless different standards for the release of information to the courts are adopted by the intelligence agencies, we face the likelihood that former high officials cannot be tried for crimes related to their conduct in public office. The intelligence agencies, the Attorney General, and my office have been trying to deal with this problem without exposing intelligence secrets, and protecting government deniability of publicly known facts. It seems clear that if we continue in this effort to withhold this information we lose a much more important national value - the rule of law.

On December 19, 1986, I was appointed Independent Counsel with responsibility for the investigation and prosecution of crimes growing out of the Iran/Contra matter, as well as illegal obstructions of my work. For over two years my office received the assistance of the Reagan Administration, through presidential representatives, Ambassador Abshire and A. B. Culvahouse. Now the work of this office is being seriously hampered by the lack of any similar point of contact in your Administration. Accordingly, I am writing to request an appointment to discuss this very serious problem, and to present to you in abbreviated form the essence of the problem.

The immediate problem is the interference of the Administration with my efforts to prosecute Joseph Fernandez, the former CIA Chief of Station in Costa Rica. The District Court has ruled admissible the details of certain programs that the CIA claims to be still secret. The Court has ruled also that the defendant may prove the existence of CIA stations in certain Latin American countries as well as the location of a CIA installation in one of those countries.

The CIA claims that although the existence of these stations is publicly known, this evidence may not be made public even though this refusal may force dismissal of the Fernandez case.

This incident follows the trial of Oliver L. North which was completed after important concessions by both the intelligence agencies and me. They released some secrets and I, in deference to secrecy claims by the National Security Agency, eliminated major charges against North. This more recent incident, as well as other information we have received, convince me that without your help the rule of law will be subordinated to the intelligence effort. The tail has begun to wag the dog.

The broad question that confronts the Administration as well as Independent Counsel is whether a group of high public officials shall be excluded from the reach of the law. The Constitution provides that the President "shall take Care that the Laws be faithfully executed" (Article 2, Section 3). These few words incorporate the essence of Anglo-American jurisprudence, the thirteenth century concept that no person, great or small, is beyond the law. The question is whether this Administration will tolerate the creation of an enclave of high public officers free from the rule of law simply because those public officers deal extensively with classified information.

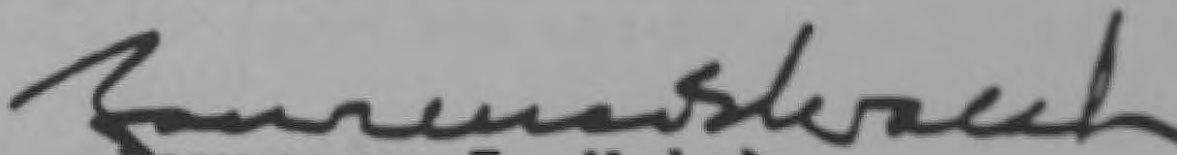
The Classified Information Procedures Act (CIPA) does not solve this problem. It merely provides a procedure by which to expose it. One branch of government, the judiciary, is left to decide the materiality of evidence, while another, the executive, is left to decide what secrets may be revealed. My office will do its best to utilize the procedures of the courts, and, if appropriate, husband its opportunities for appeal. Only the President, however, can deal with agencies of the executive branch if they, on a highly subjective basis, refuse to make information available to the courts because of their concern for the difficulties and niceties of intelligence work.

The problems of CIPA in a case prosecuted by Independent Counsel must be reviewed from a viewpoint broader than that of the agencies directly concerned with intelligence issues. There is a very serious danger that a ritualistic application of classification procedures will insulate most if not all officers responsible for national security from prosecution for crimes committed in office. This danger is particularly acute in the case of former high officials such as Poindexter, but it has also become apparent in cases of those who held less elevated positions, such as Fernandez. To leave these decisions solely to the unreviewed

judgment of agencies concerned with intelligence issues runs a very real risk of emasculation of the rule of law which the Independent Counsel was appointed to further. To prevent this from happening, I am appealing to you to provide a higher level of review for these crucial decisions. We respectfully suggest that particularly in cases where the Attorney General has been superseded by Independent Counsel because of possible conflict of interest, this review should be conducted in the White House itself, either by a member of the Presidential staff or by a specially appointed Presidential body assigned that responsibility.

In summary, I believe that concern for the preservation of secrets relating to national security is being used in exaggerated form and will defeat necessary prosecutions of high government officers. I should like to meet with you to urge that: (1) the intelligence agencies be directed to use a more liberal standard for the trial of former government officials; (2) that my office be given an avenue of communication with you through someone on your staff free of agency limitations; and (3) that you consider the possible use of a Presidential commission to review any agency action which conflicts with the rulings of the trial court in the connection of prosecution of high government officials.

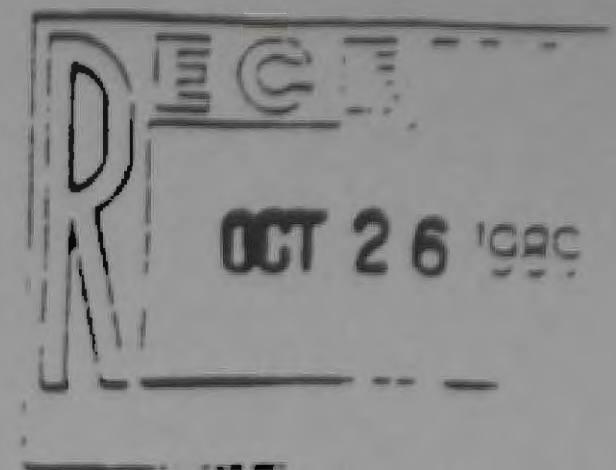
Respectfully yours,


Lawrence E. Walsh
Independent Counsel

Mr. Lawrence E. Walsh
Independent Counsel
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Washington, D.C. 20001

THE WHITE HOUSE
WASHINGTON

October 25, 1989



Dear Mr. Walsh:

We are in receipt of your October 19 letter seeking a meeting with the President. Such a meeting would not be appropriate as the President is fully confident with the established procedures to handle the Iran/Contra litigation.

I can assure you that the Administration takes seriously its role in balancing your need to use classified information with the need to protect national security and the lives of our citizens. I have spoken with the Attorney General, the President's highest ranking law enforcement official, who continues to stand ready to meet with you on any questions concerning your handling of the Iran/Contra litigation, including the disposition of classified materials.

I hope you will join with the Administration in giving effect to all law, including the statutes established to protect classified information. I trust that you will work with the Attorney General in that endeavor.

Sincerely,

C. Boyden Gray
Counsel to the President

Mr. Lawrence E. Walsh
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10/26/89
C. Boyden Gray
Counsel to the President

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October 31, 1989

BY HAND

C. Boyden Gray, Esq.
Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. Gray:

Your letter of October 25, 1989, is acknowledged. I regret your conclusion that the problems presented by my letter do not merit a discussion with the President or a contact in the White House. I believe that you have belittled the gravity of the problem which is evolving.

I shall, when appropriate, take advantage of the willingness of the Attorney General to discuss problems with me. It would be misleading, however, not to point out that the Attorney General is in a difficult position to adjust the attitudes of the intelligence agencies -- only the White House can do that. The Attorney General comes into the CIPA process at the very end, after the intelligence agencies have in essence refused to comply with a district court order. The delays in Fernandez, as well as early experiences in North, show an adherence to over-protective classification concepts that will be difficult to reconcile with a realistic commitment to prosecute high-ranking national security officials for crimes committed in office.

Although you have not dealt specifically with my request for a White House contact, we understand your letter as a rejection of the relationship enjoyed with the Reagan Administration and a return to a conventional, more formal attitude towards those conducting an investigation.

You may be sure that I appreciate the attention you have given this matter.

Sincerely yours,



Lawrence E. Walsh
Independent Counsel